No. 95-677

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

J.D. NICHOLS and NTS CORPORATION,

Petitioners,

vs.

JENO PAULUCCI and SILVER LAKES I, INC., individually and d/b/a PR PARTNERS,

Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fifth District

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Florida district court of appeal erred in considering Petitioner Nichols' contacts with the state of Florida as a general partner of numerous limited partnerships, along with all of his other significant contacts, in its determination that Nichols was subject to personal jurisdiction in Florida?

2. Whether this Court has created a standard for the exercise of general jurisdiction whereby a corporation must have a *de facto* place of business in a state to be subject to the general jurisdiction of that state?

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IN THE
SUPREME COURT OF THE UNITED STATES
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J.D. Nichols and NTS Corporation,
Petitioners,

V.

Jeno Paulucci and Silver Lakes I, Inc.,
individually and d/b/a PR Partners,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Jeno Paulucci and Silver Lakes I, Inc., individually and d/b/a PR Partners ("Respondents"), respectfully request that this Court deny the petition for writ of certiorari that seeks review of the judgment of the District Court of Appeal of Florida, Fifth District, below. That opinion is reported at 652 So.2d 389 (5th DCA 1995), and is reprinted in the Petition for Certiorari at Appendix A.

STATEMENT OF THE CASE

Respondents accept the Petitioners' Statement of the Case with the following exceptions:

1. The Fifth District Court of Appeal of Florida affirmed the trial court's exercise of general personal jurisdiction by specifically applying the constitutional due process requirements enunciated in Helicopteros Nacionales De Colombia S.A. v. Hall, 466 U.S. 408 (1984). The district court did not place a new construction upon those constitutional requirements or seek to interpret any single phrase of the Helicopteros opinion. (3a-4a)[1]

2. In its ruling regarding general jurisdiction over Nichols, the district court considered all the evidence in the record that Nichols was engaged in the active conduct of business in Florida, not just the fact that Nichols was the general partner in limited partnerships doing business in Florida. In fact, the district court flatly rejected Respondents' argument that Nichols was subject to jurisdiction simply because he is a general partner in a Florida limited partnership. (5a) The court held that the limited partnerships must be actively conducting business in Florida for the nonresident general partner to be subject to the jurisdiction of the Florida courts. (5a, fn3)

Nichols was the general partner of at least six (6) limited partnerships actively conducting business in Florida, and four (4) more limited partnerships that served as the general

[1]References are to Petitioners' Appendix.

partner of limited partnerships actively conducting business in Florida (effectively making NICHOLS the general partner of a general partner of a partnership doing business in Florida). (4a-5a) The district court did not consider any activities Nichols performed as an officer or director of the different NTS corporations. (6a)

3. The district court also considered Nichols' activities outside those of the limited partnerships submitted in the record evidence. (4a, 6a) Respondents submitted evidence to the trial court, which was also submitted in the appellate record (although not specifically enumerated by the district court), of Nichols' activities in Florida. Contrary to Nichols' assertion, those activities considered by the district court and contained in the record were not limited to the two days per year spent by Nichols in Florida, the execution of the guarantee for the mortgage on the joint venture's real property, and the previous ownership of a vacation home in Florida.

The trial court also properly considered record evidence of Nichols' personal guarantees and multiple modifications to those guarantees with regard to loans made to the Joint Venture (the subject matter of the lawsuit) including guarantees made in September of 1987, on March 16, 1987, on October 23, 1987, and a loan commitment on January 25, 1989. These guarantees not only guaranteed the repayment of loans obtained for the purchase and development of the Joint Venture property, but in some instances also guaranteed the completion of any approved development improvements. Nichols further executed a Consent and Agreement of Guarantors on multiple occasions in

conjunction with the eight Amendments to the Florida Mortgage and Security Agreement.

4. The district court likewise based its jurisdiction over NTS based on extensive record evidence of NTS's active conduct of business in Florida. Specifically, the district court cited to the extent of NTS's contacts with the joint venture and the degree of control exercised by NTS over the NTS subsidiaries in partnership with the Respondents. (7a-8a) For example, in its recitation of twelve distinct business activities performed in Florida by NTS, the district court specifically referenced the monthly visits by NTS's president and chief operating officer to NTS affiliates in Florida, and the daily control exercised by that same officer over OLF, Inc. (the NTS affiliate that is a partner with Respondents in the joint venture).

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FLORIDA FIFTH DISTRICT COURT OF APPEAL DOES NOT REST ON THE PROPOSITION OF LAW STATED IN PETITIONER NICHOLS' QUESTION PRESENTED.

In an effort to obtain review here, Nichols has fashioned a question presented that mischaracterizes the nature of the decision of the Florida Fifth District Court of Appeal.

The first question presented (pertaining only to the exercise of jurisdiction over Nichols) suggests that the district court based jurisdiction over Nichols solely upon Nichols' contacts with Florida as the general partner of limited partnerships

doing business in Florida. In fact, the district court simply applied the constitutional due process test set forth in Helicopteros Nacionales De Colombia S.A. v. Hall, 466 U.S. 408 (1984). As outlined above in the Statement of the Case, Nichols maintained continuous and systematic general business contacts with Florida, and the district court found that Nichols was subject to the general jurisdiction of the Florida courts based upon all of those contacts.

The mere fact that some of those contacts were through Nichols' limited partnerships doing business in Florida does not diminish the significance of Nichols' other contacts with Florida. Although the district court considered Nichols' contacts with Florida through his partnerships, the district court upheld the trial court's assertion of jurisdiction over Nichols based upon the totality of Nichols' contacts with Florida.

The issue of general jurisdiction is a factually intensive determination which must be made based on the circumstances of each case. It is therefore impossible to set forth inflexible parameters to properly govern every possible situation. Here, Nichols is merely seeking an additional forum to reargue the facts already presented in exacting detail both to the trial court and to the district court. Jurisdiction in this Court is not exercisable, however, merely to give the defeated party another hearing. See Magnum Import Co. v. Coty, 262 U.S. 159 (1923).

In the first question presented, Nichols also attempts to create the impression that the district court erred in failing to differentiate among Nichols' plethora of contacts with

Florida in determining jurisdiction. In other words, Nichols attempts to argue that in determining general jurisdiction, only specific types of contacts should be considered, and those contacts that may be properly considered for specific jurisdiction can under no circumstance be considered for general jurisdiction purposes.

As applied to the present case, Nichols would therefore argue that a general partner of a limited partnership doing business in Florida could visit Florida virtually every day (indeed, that the general partner could not be found in his home state except on weekends and holidays), but the general partner would not be subject to general jurisdiction in Florida because the general partner was in Florida only on limited partnership business. This argument is specious. See Kelly v. Department of Insuarance, 597 So.2d 900 (Fla. 3d DCA 1992) (a limited partnership gains its identity from its general partners, and thus the limited partnerhips contacts with the particular forum may be attributed to the general partners); Levinson v. Brosche, 578 So.2d 477 (Fla. 4th DCA 1991). It is basic hornbook law that each general partner of a partnership is regarded as a principal for himself and as an agent for the partnership. 68 C.J.S. Partnership § 136 (1950). As such, Nichols is treated by the law as an individual (principal) and as an agent of each of his limited partnerships. His effort to dichotomize his partnership activities from his other business contacts with Florida has no basis in the law. In fact, the Florida district court refused to consider as relevant his activities as an officer and director of the various NTS corporations, and only considered his partnership and individual activities.

No such dichotomy, as suggested by Petitioner Nichols, has been applied in Helicopteros, Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980), or any other decision of this Court. Clearly, this Court considers all relevant contacts with the forum state in the determination of general jurisdiction, just as the Florida district court did.

The Florida Fifth District Court of Appeal properly considered all of Nichols' relevant contacts in finding him subject to the general jurisdiction of the Florida courts. The district court did not distinguish Nichols' contacts as a general partner of certain limited partnerships for the purpose of general jurisdiction because no such distinction exists. Nichols argues that this Court should grant the petition because no court has determined that the activities of a general partner of a limited partnership should be distinguished from his other activities in the state for the purpose of general jurisdiction. No court has created such a dichotomy, however, because this Court has set forth a workable test whereby a court properly focuses on "the relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204 (1977). The district court properly focused on those considerations, and found that Nichols was subject to the jurisdiction of the Florida courts.

The Florida district court has not created a unique or unresolved issue of Constitutional law in its decision below. The district court simply applied this Court's minimum contacts analysis, and properly determined that Nichols

engaged in a continuous and systematic course of business contacts with Florida. Therefore, the Petition should be denied.

II. THE DECISION OF THE FLORIDA FIFTH DISTRICT COURT OF APPEAL DOES NOT REST ON A PROPOSITION OF LAW THAT CREATES A CONFLICT WITH THE DECISION OF ANOTHER STATE COURT OR OF A UNITED STATES COURT OF APPEALS.

Just as the district court found general jurisdiction over Nichols based upon the myriad and totality of his relevant contacts with Florida, the district court also found jurisdiction over NTS based upon the totality of its contacts with Florida. The district court did not base jurisdiction over NTS solely on NTS's provision of services to its related entities in Florida. NTS also engaged in other activities which properly led the district court to conclude that NTS has established a course of continuous and systematic business contacts with Florida. (8a)

Further, contrary to Petitioners' assertion that NTS's activities are unrelated to the current cause of action, virtually every contact listed by the district court is directly related to the crux of the dispute between the parties - the joint venture in Seminole County, Florida. The district court recited the following contacts by NTS that are inextricably intertwined with the underlying lawsuit:

a. NTS is the guarantor of the $13 million loan to the joint venture. This guarantee assured not only

payment but actual completion of construction by NTS;

b. NTS actually performed the accounting services for its affiliates that are partners with Respondents in the joint venture;

c. NTS itself actually issued checks to cover expenses of the joint venture;

d. NTS provided and billed for its management services to the joint venture - in other words, NTS was managing the project in Florida and billing for that service;

e. NTS's decorator/architect traveled to Florida and performed services for the joint venture;

f. NTS itself issued purchase orders and invoices for the joint venture;

g. NTS and NTS/Residential and OLF, Inc. (the NTS affiliates that were partners with Respondents in the joint venture) shared common officers and directors;

h. NTS's president and chief operating officer exerted daily control over OLF, Inc. (the NTS affiliate that was a partner with Respondents in the joint venture), and visited Florida on a monthly basis. (8a)

As demonstrated by this list of contacts (which is not the entirety of the contacts considered by the district court), NTS

is indeed engaged in continuous and systematic general business contacts with Florida. In fact, these significant contacts alone are enough to warrant a finding that NTS has a *de facto* place of business in Florida.

Further, even if NTS's contacts with Florida were completely unrelated to the underlying cause of action, neither this Court nor any federal court has established, as Petitioners suggest, the hard and fast requirement that a corporate defendant must maintain a *de facto* principal place of business in the forum state to be subject to general jurisdiction in that state. (P8) The facts in the case of Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952), do indicate that the defendant in that case had in fact temporarily moved his principal place of business from the Philippines to Ohio. Nothing in that decision indicates, however, that a rule was created mandating that a corporate defendant maintain a place of business in a state in order to be subject to general jurisdiction there. In fact, Petitioners argument that a *de facto* place of business must exist (P8) conflicts with the very concept of even establishing a test to determine general jurisdiction over a corporate defendant. If this Court intended such to be the case, the general jurisdiction test would not be "continuous and systematic business contacts" as set forth in the Helicopteros case, but a test merely to determine if the defendant maintained a place of business in the forum state.

Additionally, the decision in International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), cited by Petitioners as support for the proposition that general jurisdiction requires a *de facto* principal place of business, does not lend credence

to that argument. First, that decision pre-dates the analysis formulated in International Shoe and Helicopteros, and the decision does not appear to employ any early version of that test. The Court in International Harvester did, however, consider all of the defendant corporation's contacts with the forum state in arriving at its conclusion that the defendant was doing business in the state. The defendant corporation, International Harvester, solicited orders within the forum state, shipped machines to the forum state, and authorized its agents to accept payment in the forum state. International Harvester did not, however, maintain a "*de facto* principal place of business" in the forum state, nor was any mention made in the decision that a significant part of International Harvester's business was carried on in the forum state. The finding that International Harvester was doing business in Kentucky (the forum state) was based on the totality of its contacts with Kentucky.

Also contrary to Petitioners assertion, the Helicopteros test has not been applied by lower courts to limit the exercise of general jurisdiction to those limited circumstances wherein the defendant is found to have a *de facto* place of business in the forum state. For example, in the case of Barber v. Pittsburgh Corning Corp., 464 A.2d 323 (Pa.Super. 1983), the court dealt with the exercise of jurisdiction over the parent corporation (Charter) of a company doing business in Pennsylvania (Cape). Charter was a holding company, similar to NTS, that conducted virtually all of its business through its subsidiaries. Charter placed its own executives on Cape's board of directors and participated in Cape's important business decisions. Charter also owned another subsidiary, Pandrol, that manufactured and sold rail

equipment in Pittsburgh. Charter had further direct business contacts with Pennsylvania including meetings, sales, technical consultations, business planning, and a securities transaction. The court held that because Charter clearly exercised a great deal of control over its subsidiaries that did business in Pennsylvania, Charter was subject to the jurisdiction of the Pennsylvania courts. Although Charter did not maintain a *de facto* place of business in Pennsylvania, the court found that its contacts were so substantial as to subject the corporation to jurisdiction for the cause of action arising out of its subsidiaries' actions. Other than its contacts with its subsidiary, however, Charter had no connection with the cause of action.

The court in Reul v. Sahara Hotel, 372 F.Supp 995 (S.D. Tex. 1974), dealt with the same issue from a slightly different perspective. There, the question was whether a defendant California corporation that was the subsidiary of a New York corporation could be said to be doing business in Texas for the purpose of in personam jurisdiction. Plaintiffs alleged that the California corporation did business in Texas through its parent, a New York corporation (i.e., the converse of the present situation). The United States district court applied the same analysis as the Barber court, looking to the degree of control exercised by the parent corporation over its subsidiary corporations. As in the present case, the parent and the subsidiaries shared common officers, and the parent corporation performed service activities for the subsidiaries such as advertising and accounting, for which the subsidiaries reimbursed the parent corporation at year's end. The United States district court held that due to the complete control exercised by the parent

over the subsidiaries (a determination based on facts nearly identical to those in the present case), the California subsidiary was subject to in personam jurisdiction in Texas. The California subsidiary had no connection to the cause of action other than the fact that "[t]he activities . . . performed in Texas by the New York parent are the same activities which are performed in Nevada by the California subsidiary." Reul, 372 F.Supp. at 1002. The California subsidiary most assuredly did not maintain a *de facto* place of business in Texas.

In the present case, the district court applied a similar analysis. The district court properly considered the relationship among NTS, Florida, and the underlying litigation. While the district court did not deal with the exercise of jurisdiction under Section 48.193(1), Florida Statutes (1993)[2], the district court properly considered the

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[2]48.193 Acts subjecting person to jurisdiction of courts of state.—

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself . . . to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a tortious act within this state.

(c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.

(d) Contracting to insure any person, property, or risk located within this state at the time of contracting.

. . .

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either

1. The defendant was engaged in solicitation or service activities within the state; or

degree of control exerted by NTS over its subsidiaries in Florida in partnership with Respondents as well as NTS's other significant activities in the state in finding jurisdiction over NTS.

Finally, the Florida district court case of Universal Caribbean Establishment v. Bard, 543 So.2d 447 (Fla. 4th DCA 1989), when compared with the case of Green v. Chicago, Burlington, & Quincy Railway Co., 205 U.S. 530 (1907), does not show that Florida courts have misapplied the test for general jurisdiction. In the pre-International Shoe Supreme Court case, the Court clearly stated that it was not "undertaking to formulate any general rule defining what transactions will constitute "doing business" in the sense that liability to service is incurred . . . ." The Court was simply analyzing the defendant's contacts with the forum to determine the sufficiency of service of process. The Court was not applying the test set forth in Helicopteros, or any stated version of that test, in arriving at its decision.

In Universal Caribbean, however, the Florida district court specifically referred to the Constitutional principles in International Shoe in applying the factually intensive due process analysis. Further, just as the district court did in the present case, the Universal Caribbean court also held that the

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2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

. . . .

degree of control by a parent corporation was a factor in its determination of jurisdiction.

The determination by the district court that NTS and Nichols are subject to the jurisdiction of the Florida courts was based on the factually intensive analysis dictated in Helicopteros and cited by the district court. Petitioners' argument that other courts faced with different factual circumstances may have arrived at different conclusions merely amounts to a further attempt by Petitioners to reargue the facts, and does not warrant granting a writ in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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